Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1167

WILLIAM GOLDSMITH,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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No.

WILLIAM GOLDSMITH,

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COMMONWEALTH OF PENNSYLVANIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The petitioner, William Goldsmith, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania and the opinion of the trial court entered in this proceeding on October 31, 1979.

OPINION BELOW

The Supreme Court of Pennsylvania affirmed the judgment of sentence without opinion. The opinion of the trial court appears in the appendix hereto. The Superior Court of Pennsylvania affirmed the judgment, also without opinion.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 14, 1979. A timely application for reconsideration of the court's denial of petition for allowance of appeal was denied on October 31, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. May an officer of the state employ emotional and irrelevant rhetoric in an effort to obtain a criminal conviction in a state criminal trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution is involved:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

William Goldsmith, petitioner, was arrested on February 17, 1976 and charged with murder, criminal conspiracy and possession of an instrument of crime. He was accused of shooting one James Turner on November 19, 1975.

Petitioner was tried on the charges before the Honorable John A. Geisz of the Philadelphia County Court of Common Pleas and a jury. On August 19, 1976, the jury acquitted the petitioner of the murder charge, but convicted him of criminal conspiracy and of possession of an instrument of crime generally.

Petitioner, during the course of the trial, objected to the argument to the jury of the Assistant District Attorney, which is quoted from the record as follows:

> "MR. LUNKENHEIMER:
>
> . . . .Nobody had the right to execute James Thomas just because they felt like it. He had a right to live his life, to make his mistakes, to be a human being.
>
> You have sworn an oath to do your duty, to consider the evidence fairly, to deliberate honestly and in true conscience about that evidence. You have also sworn that if the evidence is there, you will be able to stand up in this jury box and announce the verdict. You are the representatives of the City of Philadelphia.
>
> If we are to protect each and every somebody, somebody's got to have the courage to stand up and as Jesse Jackson said, 'Call it as it is'. Lies are lies. Murder is murder.
>
> Crystal Cooper had the courage. She may have been nervous and scared but she had the courage. William Chew had the courage. Maybe Calvin Bailey didn't have the courage. But you have sworn . . .
>
> MR. SIEGEL: Objection.
>
> THE COURT: Objection noted on the record.
>
> MR. LUNKENHEIMER: You have sworn to do your duty based upon the evidence presented to you and if this City is to be free from the type of willful, deliberate, premeditated murder that the

evidence shows you this is, then the jurors must stand up and have the courage to call murder murder and when a man knocks down a man with his sucker punch, after being away ten minutes and getting a gun, going through the act of getting that gun and coming back, knocking him down and then shooting him what more willful, deliberate and premeditated act can there be? In the defense of each and every somebody, in the defense of James Thomas, the evidence is there. You must have the courage to stand up and announce a verdict of guilty of murder in the first degree." (Vol. 6, NT113-115).

The trial court in its opinion, found in the appendix, held that the comments of the Assistant District Attorney could "at worst be characterized as an isolated expression by the Assistant District Attorney as to the credibility of the witnessess".

Petitioner was sentenced to two concurrent terms of imprisonment of not less than two and one-half nor more than five years on the conviction.

The Superior Court of Pennsylvania on December 22, 1978 affirmed the conviction of the trial court without opinion in a per curiam decision.

The Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal on May 14, 1979, and on October 31, 1979, denied petitioner's application for reconsideration of the denial of allowance of appeal.

REASONS FOR GRANTING THE WRIT

The decision below raises significant and recurring constitutional problems concerning the protection afforded a criminal defendant from irrelevant and emotional arguments to a jury by a state prosecutor.

The special position of the state prosecutor is an undeniable fact in a jury trial. The American Bar Association Standards Relating to the Prosecutor's Function attempted to codify the restraints which should be placed upon the prosecutor in order to control the abuse of that special position.

The Supreme Court of the United States has not given definitive guidance to the states as to what restraints concerning inflammatory and prejudicial remarks should be placed upon the state in the trial of a criminal case.

In the case, *Viereck v. United States*, 318 U.S. 236 (1943), the Court held that an emotional appeal to a jury's patriotism in a time of war prejudiced the defendant's right to a fair trial.

In the instant case, under the guise of attacking credibility, an emotional appeal to courage in fighting crime in the city in an era of a high crime rate is irrelevant to the facts of a particular case, and only calculated to inflame the jury's prejudice, thus depriving a defendant of his constitutional right to a fair trial.

The Supreme Court should issue a writ of certiorari to give the state courts guidance in an area which otherwise will be constantly litigated in the district courts in habeas corpus proceedings.

The right to a fair trial in the state courts is guaranteed by the Fourteenth Amendment of the United States Constitution.

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), this Court reversed the court of appeals and found that the

defendant was not deprived of a fair trial for reasons which, *inter alia*, required a reviewing court to speculate on the effect of improper remarks upon a jury, and the intent of the prosecutor in making those remarks.

In the *Donnelly* case, Mr. Justice Douglas, in his dissenting opinion, stated that the function of the prosecutor under the Federal Constitution is not to "tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and gives those accused of crime fair trial." at page 649.

The various jurisdictions throughout the country have been struggling with this question under the general topic of a prosecutor expressing his personal opinion as to the guilt of a criminal defendant. *See* 41 A.L.R. Fed. 10 and 88 A.L.R. 3d 499.

The Supreme Court should issue a writ of certiorari and consider eliminating rhetorical appeals to emotion and prejudice by state court prosecutors which would reduce the number of cases which must be reviewed, and would result in convictions founded strictly on the evidence, and not on impassioned pleas for justice, courage and country.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania and the opinion of the trial court.

Respectfully submitted,

Gene D. Cohen
Attorney for Petitioner

APPENDIX

OPINION OF THE COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

MARCH TERM, 1976

NOS. 292 - 294

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM GOLDSMITH

GEISZ, J. January 3rd, 1978: On November 19, 1975, James Turner was shot and killed on the sidewalk outside of a North Philadelphia taproom. William Goldsmith was arrested for the offense on February 17, 1976 and was tried before a jury. On August 19, 1976, the defendant was acquitted of murder and manslaughter charges, but convicted of criminal conspiracy and possession of instruments of crime generally. Post trial motions were later argued and denied, and on October 3, 1977 the defendant was sentenced to concurrent terms of from two and one-half to five years on each of the convictions.

I. THE COMMONWEALTH'S EVIDENCE IS SUFFICIENT AS A MATTER OF LAW TO SUPPORT THE VERDICT OF GUILTY AS TO CRIMINAL CONSPIRACY.

The detendant contends that the verdict of guilty as to criminal conspiracy was against the weight of the evidence and the law. In passing on the sufficiency of the evidence, it must be

determined whether accepting as true all the evidence together with inferences therefrom upon which the jury could properly have based its verdict, such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt. *Commonwealth v. Boyle,* 368 A2d 661 (1977), *Commonwealth v. Brown,* 357 A2d 147 (1976).

During the afternoon of November 19, 1975 several men were engaged in a dice game on the sidewalk adjoining the Turner Bar at 32nd and Turner Streets in Philadelphia. Among the players were James Thomas, William Goldsmith, Kenneth Jubilee and William Chew. Chew testified that an argument arose between Thomas and Goldsmith when Thomas was slow in paying a ten dollar bet. Thomas did pay but Goldsmith then left and returned with a .32 caliber pistol in his hand. At the sight of the gun, Chew fled up the street and after going about half a block he heard a single gunshot. He then returned to the corner where he found the victim lying on the sidewalk and saw the defendant leaving in an old maroon Buick. Thomas died shortly thereafter.

Crystal Cooper watched the incident from the third floor window of her house across the street from the bar. She testified that she saw Thomas and Goldsmith arguing and that Goldsmith struck Thomas with a cane or stick, causing him to fall down against the bar wall. The defendant then grabbed Thomas, pulled him up and shot him in the chest. She also stated that she saw defendant flee in a car.

At about this time, Henry Crump was seated in a parked car about one block from the scene. He testified that two cars, one a maroon Buick and the other a blue and white Cadillac, approached the corner and pulled alongside each other. Although he could not identify the cars' occupants, he saw the driver of the Buick pass a brown paper bag to the driver of the Cadillac. The cars then left in separate directions.

The police later impounded a 1963 maroon Buick and a 1973 blue and white Cadillac. The Buick was found in front of the apartment of Audrey Drayton, the girlfriend of the defendant and the owner of the apartment where he was arrested. The Cadillac belonged to Kenneth Jubilee, who was arrested at his residence on March 12, 1976 and charged as a co-conspirator in this case. During the course of the arrest, police found a small box containing five .32 caliber bullets at the residence.

A statement which the defendant gave police was admitted at trial. In it he admitted shooting Thomas although he denied any intent to kill. He said that he borrowed the gun from Jubilee. Jubilee had told him the gun was in his car and Goldsmith left the dice game momentarily to go and get it. The gun was never recovered by the police.

Clearly the quality and quantity of evidence presented by the Commonwealth could properly have supported a finding of first degree murder. Yet defendant contends that it was insufficient to support the conspiracy verdict, arguing that at best it shows that the defendant acted alone. But it is obvious from the defendant's statement and other circumstantial evidence that Goldsmith could not have acted without the knowing and willing cooperation of Jubilee in supplying him with the murder weapon at a time when Jubilee knew Goldsmith was angry with Thomas. Thus the jury could properly have found the existence of a criminal conspiracy based on these facts.

The defendant argues further that as a matter of law, a criminal conspiracy could not be made out. This argument is based on the fact that charges against Jubilee were dismissed at his preliminary hearing. Defendant contends that where only two parties are charged with conspiracy and one is not later convicted, then the conviction of the other is precluded. While it

is true that the acquittal of one alleged co-conspirator where only two are charged will bar the conviction of the other, the conviction of both is not necessary to establish a conspiracy. In a leading case on the conspiracy doctrine, the Pennsylvania Superio- Court stated:

> "The law requires only that there be at least two guilty conspirators, not that there be two convicted conspirators. Where one of two conspirators is acquitted, then there is a legal determination that one is innocent and thus there cannot be two guilty conspirators. Where, however, one is not yet indicted or for some reason cannot be tried, there is no bar to the conviction of the other." *Commonwealth v. Salerno,* 179 Pa. Sup. 13 (1955)."

The dismissal of charges against Jubilee at his preliminary hearing did not operate as an acquittal such that would preclude a conspiracy verdict here. The Commonwealth's burden was to prove the existence of two guilty conspirators and it has done so.

II. STATEMENTS MADE BY THE ASSISTANT DISTRICT ATTORNEY DURING HIS CLOSING ADDRESS TO THE JURY WERE NOT INFLAMMATORY.

Defendant next contends that certain remarks made by the Assistant District Attorney in his closing speech to the Jury were so inflammatory as to deny the defendant a fair trial. In particular defendant cites the assistant district attorney's frequent characterization of the shooting as an "execution", (N.T. Pp. 110-113, Vol. 6.) and also the following statement.

"MR. LUNKENHEIMER:

> . . . Nobody had the right to execute James Thomas just because they felt like it. He had a

right to live his life, to make his mistakes, to be a human being.

You have sworn an oath to do your duty, to consider the evidence fairly, to deliberate honestly and in true conscience about that evidence. You have also sworn that if the evidence is there, you will be able to stand up in this jury box and announce the verdict. You are the representatives of the City of Philadelphia.

If we are to protect each and every somebody, somebody's got to have the courage to stand up and as Jesse Jackson said, 'Call it as it is'. Lies are Lies. Murder is murder.

Crystal Cooper had the courage. She may have been nervous and scared but she had the courage. William Chew had the courage. Maybe Calvin Bailey didn't have the courage. But you have sworn . . .

MR. SIEGEL: Objection.

THE COURT: Objection noted on the record.

MR. LUNKENHEIMER: You have sworn to do your duty based upon the evidence presented to you and if this City is to be free from the type of willful, deliberate, premeditated murder that the evidence shows you this is, then the jurors must stand up and have the courage to call murder murder and when a man knocks down a man with his sucker punch, after being away ten minutes and getting a gun, going through the act of getting that gun and coming back, knocking

> him down and then shooting him what more willful, deliberate and premeditated act can there be? In the defense of each and every somebody, in the defense of James Thomas, the evidence is there. You must have the courage to stand up and announce a verdict of guilty of murder in the first degree." (N.T. Pp. 113-115, Vol. 6.)

Defendant contends that these statements were inflammatory because they called for the jury to disregard the evidence and find the defendant guilty of first degree murder as a matter of personal courage.

In *Commonwealth v. Joyner,* 365 A2d 1233 (1976) at 1234, the Pennsylvania Supreme Court set down the standards for evaluating the propriety of closing remarks by a prosecutor.

> "A new trial is required where the remark is prejudicial; that is, when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial. 450 Pa. at 611, 301 A2d at 674. See also *Commonwealth v. Simon,* 432 Pa. 386, 248 A2d 289, 292 (1968). ('In Pennsylvania, the law is clear that the alleged offending language's unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict')."

The allegedly objectionable remarks in the instant case could at worst be characterized as an isolated expression by the assistant district attorney as to the credibility of the witnesses. Even if they could be labeled as potentially prejudicial, it is abundantly clear that they did not have the impact charged by

the defendant since the jury found the defendant not guilty as to the murder charge. The acquittal unequivocally indicates that the jury's deliberations were dispassionate and free of bias, and it cannot be said that the defendant was harmed in any way. Therefore, defendant's contentions on this issue must be deemed baseless.

III. THE DEFENDANT'S STATEMENT WAS PROPERLY ADMITTED AT TRIAL.

Defendant's final contention is that his statement to the police should have been supressed and was improperly admitted at trial. A suppression hearing on this issue was held before the Honorable Theodore B. Smith, Jr. on April 30, 1976. There, as here, the defendant testified that he was kicked and beaten by Homicide Detectives at Homicide Headquarters on the morning of his arrest.

Judge Smith found that the defendant's testimony was not credible, that he had freely and intelligently waived his right to counsel and to remain silent, and that the statement was spontaneously and voluntarily given to the police. The trial court agreed and the statement was properly admitted at trial.

For the foregoing reasons defendant's motion for a new trial and in arrest of judgment is hereby denied.

BY THE COURT

s/ John A. Geisz
J.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED MAY 17, 1979

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

May 17, 1979

Gene D. Cohen, Esq.,
Harry Siegel, Esq.,
1201 Chestnut Street, 2nd Floor
Phila., Pa. 19107

In re: Commonwealth v. William Goldsmith,
Petitioner.
No. 4136 Allocatur Docket

Gentlemen:

This is to advise you that on May 14, 1979 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

Sally Mrvos
Prothonotary

by Catherine E. Lyden
Catherine E. Lyden
Deputy Prothonotary

CEL:mb

CC: Robert B. Lawler, Esq.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED NOVEMBER 5, 1979

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

November 5, 1979

Gene D. Cohen, Esq.
Harry Siegel, Esq.
1201 Chestnut Street, 2nd Fl.
Philadelphia, Pa. 19107

Re: Commonwealth v. William Goldsmith,
Petitioner
No. 4136 Allocatur Docket

Dear Sirs:

This is to advise you that the following Order has been endorsed on the Application for Reconsideration filed in the above-captioned matter:

"October 31, 1979
Application denied.
Per Curiam"

Very truly yours,

Sally Mrvos
Prothonotary

By Catherine E. Lyden
Catherine E. Lyden
Deputy Prothonotary

CEL:ejh
cc: Robert B. Lawler, Esq.